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IN THE

Supreme Court of the United States

October Term, 1964

No. 355

BERNARD SUSSER, *et al.*,

Petitioners,

—against—

CARVEL CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OBJECTIONS OF THE CARVEL RESPONDENTS TO THE MOTION BY INTERNATIONAL FRANCHISE ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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Statement

The Carvel respondents respectfully submit this response stating their objections, and the reasons in support thereof, to the motion by International Franchise Association, Inc. (hereinafter referred to as "International") for leave to file a brief as *amicus curiae* in this matter.

Prior Proceedings

The decision of the Court of Appeals was filed on May 8, 1964 (R. 432). The petition for certiorari was filed on August 6, 1964; certiorari was granted on October 26, 1964.

The printed "Transcript of Record" prepared by the Clerk of this Court was served on all parties on December 17, 1964. Pursuant to Rule 41 of the Rules of this Court petitioners were required to, and in fact did, file their brief with the Court by January 17, 1965. By February 18th all the respondents herein had served and filed their answering briefs. On February 19, 1965 the Carvel respondents were served with a copy of International's "Motion For Leave To File Brief As *Amicus Curiae* And Brief Of International Franchise Association, Inc., As *Amicus Curiae*" which had been filed with the Clerk of this Court on February 17, 1965. No explanation or justification is set forth in the motion as to why International took no action with respect to making said motion during the some four months after the granting of the petition for certiorari, and waited until the very last day for the filing of briefs before filing and serving the instant motion for leave to intervene as *amicus* (which was bound together with its *amicus* brief).*

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* It appears that International's brief can not be timely filed with the Clerk of this Court as required by Rule 42. Thus Rule 42(2) provides that the brief of an *amicus* must be filed within the time allowed for the filing of the brief of the party supported, i.e., in this case by February 18, 1965. Though International, possibly with the thought of attempting to overcome this, submitted its *amicus* brief physically bound together in the same volume with its printed motion for leave to file such brief, that does not overcome the objection since under Rule 42(2 an *amicus* brief may be "filed only after order of the court or when accompanied by written consent of all parties to the case". Since neither condition was satisfied at the time International submitted its *amicus* brief as part of the same volume which also contained its motion for leave to file such brief, there has not yet been a proper filing of the brief and the date for making a timely filing of the brief has now passed.

Furthermore we submit that it is, at best, doubtful whether International's motion can be considered as having been "timely . . . presented to the court" as required by Rule 42(3) in view of the timing of the making of the motion.

Carvel Respondents' Reasons for Withholding Consent

Introductory.

We have declined to consent to the filing of, and now oppose International's motion for leave to file an *amicus* brief herein, for two major reasons.

First, we believe that all relevant questions of fact and law in this case have already been fully briefed by the parties to this case and therefore there is no necessity for the filing of an *amicus* brief.

Second, we believe that permitting the filing of the instant *amicus* brief would be undesirable since we view it as an unjustified attempt to have this Court enunciate doctrines of law not limited to the factual situation in the case at bar, but extending to myriads of other varying factual situations not now before the Court.

The contemplated *amicus* brief is unnecessary.

All relevant issues of fact and law have been thoroughly examined in the detailed briefs already filed by the parties to this matter.

Paragraph "3" of Rule 42 explicitly provides that where it is necessary for a party to make a motion for leave to file a brief as *amicus* because the parties to the proceeding have refused to consent to the filing of such brief (as in the instant case) such motion—

> "shall . . . set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case."

We submit that International's motion is defective in that it fails to make any showing, as required, that there

are "facts or questions of law" that will not be adequately presented by the parties.

At the time that oral request was made of us by counsel for International for our consent to the filing of an *amicus* brief we referred them to Rule 42 and advised them that we were of the opinion that there was no need for the filing of an *amicus* brief. Neither at that time, nor in their subsequently made motion now before the Court is any such showing made.

From the facts set forth in International's motion it would appear that permitting the filing of an *amicus* brief would be undesirable.

International urges that it be permitted to file an *amicus* brief on behalf of its member franchisors who are engaged in distributing through franchisees, a variety of products including bicycles, rental automobiles, dry cleaning and home cleaning services, personnel and employment agency services, paints, automobile supplies and tools. International further asserts that the decision in this case "will necessarily affect numerous other franchising arrangements".

We submit that the foregoing indicates that International is proceeding on the erroneous assumption of treating all franchising arrangements as having a substantial identity with one another. This is not the fact. Actually there is great variety in the contractual arrangements of each franchising organization compared with those of others. Furthermore, there is a variety in operation from franchisor to franchisor not only where the end product being distributed varies, but even where the same end product is being distributed through different franchising systems. The franchisor who distributes brand name bicycles or

rents automobiles presents a radically different situation from the instant one where Carvel arranges for its franchisees to manufacture its ice cream from its secret, special formula ingredients, pursuant to its recipes and then sell it under Carvel trademarks. Indeed, as the court below noted, even with respect to arranging for the manufacture and sale of ice cream products through franchised outlets, there are substantial and significant differences in contractual arrangements and operations when one franchising system is compared to another in the same field (R. 445).

We submit that this Court should adhere to its historic policy of deciding matters on a case by case basis and avoid the invitation to deal in generalities applicable to all franchise systems which International apparently seeks by asking for the granting of its motion for leave to file its *amicus* brief.

CONCLUSION

The motion for leave to file a brief as *amicus* should be denied.

Respectfully submitted,

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Dated: New York, N. Y.
February 24, 1965